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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LSC/2016/0300**
Property	:	**Flats 1 and 2, 98 Mansfield Road, London NW3 2HX**
Applicant	:	**Ms Iuka Garcia**
Representative	:	**Ms I Garcia In Person**
Respondent	:	**Fruition Investments Limited**
Representative	:	**Mr Robert Parkinson – Xenon Properties – Managing Agents**
Type of Application	:	**Section 20C and 27A Landlord and Tenant Act 1985 costs and determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr Hugh Geddes - Professional Member**
Date and venue of Hearing	:	**28 November 2106** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**12 December 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 Any costs which the respondent might incur in connection with invasive exploratory works within Flat 1 as described in a notice dated 29 December 2105 issued by Xenon Properties [112] and/or a letter issued to Xenon Properties by Ward Damp Roofing Limited dated 8 April 2015 [200] (together the Flat 1 Works) would not be reasonably incurred such that the applicant would not be obliged to contribute to the costs incurred;

   1.2 The applicant is obliged to pay to the respondent the sum of £431.64 demanded by an invoice dated 19 November 2015 [226] by way of a contribution to the costs of works carried out to the basement of the building (the Basement Works);

   1.3 The respondent shall by 23 December 2016 reimburse the applicant £150.00 being one half of the fees paid by the applicant to this tribunal in connection with these proceedings, such reimbursement may be effected by making a credit entry on the cash account as between the applicant and the respondent if that account is in debit as at the above date; and

   1.4 An order shall be made, and is hereby made, to the effect that the any costs incurred or to be incurred by the respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant to the respondent.

2. The reasons for our decisions are set out below.

NB Reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. On 5 May 2015, the respondent granted to the applicant a long lease of Flat 2 in the building known as 98 Mansfield Road, London NW3 3HX.

4. Clause 5(2)(a) [62] of the lease is a covenant on the part of the landlord to maintain and keep in good and substantial repair and condition the main structure of the building including the principal internal timbers and the exterior walls and the foundations and the roof thereof.

5. Clause 4(4) [61] of the lease is a covenant on the part of the tenant to pay to the landlord a service charge in the manner provided in the Fifth Schedule.

6. These lease terms were not in dispute and also it was not in dispute that the applicants contractual obligation is to pay to the landlord 11% of the

total expenditure properly incurred by the landlord in complying with its several obligations under the lease.

7. The applicant made an application to the tribunal pursuant to section 27A of the Act. The application raised two issues, namely the applicant's obligation to contribute to the costs of the:

   1. Flat 1 Works; and
   2. The Basement Works

   The applicant also made a related application pursuant to section 20C of the Act in relation to any costs which the respondent might incur in connection with these proceedings.

8. Directions were duly given and the applications came on for hearing before us.

The hearing

9. The applicant represented herself and was supported and assisted by Ms Margaret Hall and Mr Jonathan Steele of the PSU.

   The respondent was represented by Mr Robert Parkinson who is the current property manager employed by Xenon Properties, the managing agents.

The building

10. It was common ground that the building was erected as a house in the 1880's and has subsequently been adapted to create self-contained flats. The latest redevelopment was carried out by, or at the behest of, the respondent in 2008 when seven flats were created. All of those flats have now been sold off on long leases. Five flats were sold off in 2008 and Flats 2 and 3 were sold off in 2015.

11. The Flats are laid out over four floors. Beneath the ground floor there is a former coal-hole or cellar which has been adapted to create a communal area housing a washing machine and a tumble drier.

12. Flats 1 and 1A are located on the ground floor. Flat 2, which is a studio flat, is on the first floor and lies above Flat 1 in essentially what might be described as a rear addition erected some time ago. It was not in dispute that the external walls of this rear addition are of single brick construction with no or no adequate thermal insulation and thus are not energy efficient and are prone to severe condensation unless the occupier takes appropriate precautions.

13. We were told that the long leases of the flats were prepared by the same solicitors and, so far as Mr Parkinson was aware, they were in common form.

14. We noted that the lease of Flat 2 defined the extent of the demised premises to include the plastered coverings and plaster work of the

walls bounding the flat and the plaster work of the walls and partitions lying within the flat, the plastered coverings and plaster work of the ceilings and the surfaces of the floors including the whole of the floor boards and any supporting joists.

The Flat 1 Works

15. Evidently the lessee of Flat 1 has complained to the respondent over the years that the flat is damp and suffers severe condensation.

16. From time to time the respondent has procured comments from Ward Damp Roofing Limited (Wards) as to what might be done to assist the lessee of Flat 1. Wards has issued a series of recommendations:

2 July 2008 [180]. Wards investigated and suggested dampness could be due to the absence of a damp proof course, hygroscopic plaster absorbing moisture in damp conditions and/or rising dampness caused by moisture rising in the walls by capillary action. Nitrates, chlorides and other salts can be deposited on the plaster surface as water evaporates from the surface. Evidently, the wall may be persistently damp, particularly during periods of high humidity and even after the rising damp has been arrested.

The recommendation was that Wards should install a chemical damp proof course to the walls of most (but not all) of Flats 1 and 2 [189]. Evidently this was accepted and the work was carried out.

A second recommendation to hack off damp and perished plaster to heights and area as specified and to render with specialist materials was made but was not taken up by the respondent.

29 June 2010 [191]. Wards inspected Flats 1 and 1A. No evidence of rising damp was found, and no damp readings were obtained to the front wall and bay walls of Flat 1A. Some evidence of salt staining of the external brickwork behind a plastic down pipe indicated past water leaks from that pipe or the gutter.

Readings taken to rear elevation of Flat 1 revealed an isolated damp patch of approximately 1 metre height but no damp was recorded above or below the damp patch. Remedial recommendations were made. We do not know if those recommendations were followed up and adopted.

8 December 2011 [193]. Wards inspected Flat 1 and found the dampness was due to condensation. They also noted that bonding plasters/weak render mixes, which were not salt resistant had been used following the damp proof course Wards had injected and this had resulted in salt deposits being present on plaster surfaces.

Remedial measures in respect of the salt staining were recommended but it is not known if the respondent adopted them.

8 April 2015 [200]. Wards inspected with regards to a suspected recurrence of rising damp in the kitchen/dining area and the bedroom/shower area of Flat 1. They noted some damp readings to wall and timber floor finishes and severe condensation.

Wards noted that they had carried out damp proof course installation only in July 2008 within areas identified in their report dated 2 July 2018. They also noted that the specialist rendering recommended in their original report was carried out by others under a separate contract and from the evidence available on inspection that rendering was not carried out in accordance with their specification and is allowing the migration of hygroscopic salts/moisture to penetrate resulting in damp patches/salting spoiling the decorations. The report also noted that the extract fans to the shower area were not working and that there was no extractor fan in the kitchen area, and that some damp readings were recorded to the timber floor finishes in the bay area and bedroom area adjacent to the shower.

The cause of the problem was not known and in order to try and determine the cause Wards recommended invasive opening up and exploratory works including:

a) Lifting the floor finishes to check for possible leaks and/or defective DPM;
b) Remove affected plasters and skirting boards;
c) Note condensation control methods as recommended;
d) Render the walls with a SIKA1 additive in the mixes;
e) Attend to any found pipe leaks;
f) Renew/repair the DPM if found necessary and re-lay floor finishes; and
g) Carry out internal redecorations once the walls are fully dried out.

In order for such extensive exploratory works to be carried out it will be necessary for the fitted kitchen and bedroom units to be taken out and replaced later. The flat cannot be occupied whilst the works are carried out.

17. Xenon Properties carried out section 20 consultation processes, including going out to tender. The notice of intention is at [156] and the tender report at [160]. It was proposed that Wards carry out the render and set walls works and contractors, TAS, carry out the stripping out/reinstating works, redecoration works and attending to any leaks found. The applican'ts 11% contribution to the proposed works was put at £1,434.85 and on 10 February 2016 Xenon Properties sent the applicant an invoice for that sum, to be paid within 14 days.

18. During the course of 2015 the applicant, who is employed in the construction industry, corresponded with Xenon Properties giving reasons why she did not believe that she was obliged to contribute to the proposed works. Following threats of legal action if the invoice was not paid the applicant made her application to the tribunal.

19. In essence the applicant's case is that the specialist rendering was not applied or properly applied by the respondent's contractors in 2008, contrary to the advice given by Wards, there is no mechanical extract system in the kitchen area and the mechanical extract system in the shower area is either defective or not used by the occupiers. There is no evidence that damp is caused by a failure in the structure which the respondent is obliged to keep in repair as required by the lease.

20. Mr Parkinson explained that the respondent has not taken any professional advice in relation to this matter and relies solely on the reports/recommendations of Wards. Evidently, the proposed exploratory works are intended to appease the lessee of Flat 1 and to show her that steps are being taken in connection with her complaints.

Discussion

21. We preferred the submissions made by the applicant which struck a chord with the expertise of the tribunal.

22. The construction of Flat 1 is such that it is inevitable severe condensation will occur unless the occupier takes effective and appropriate lifestyle steps. The severity of the condensation will be exacerbated by the absence of effective wall insulation and/or mechanical extract ventilation to kitchen and bathroom areas.

23. There is no or no compelling evidence that the damp problem complained of is due to a structural defect which the respondent is obliged to repair and the costs of which he can recoup through the service charge.

24. The proposed Flat 1 Works are speculative, exploratory and invasive. Inevitably they are expensive. We find it wholly unreasonable and unjustifiable that such works be carried out at the expense of the lessees through the service charge. Mr Parkinson suggested that if the works were carried out at the cost of the lessees and it was found that there was no structural defect to repair the costs should, at that stage be repaid to the lessees. We reject that proposition. The find that a landlord should have some prima facie, reliable and independent professional evidence supporting a proposed course before embarking on extensive and speculative opening up works.

25. The proposed works appear to include substantial works to the plaster work in order remedy the defective or poor quality or minimal materials applied by the respondent's contractors contrary to the advice given by Wards at the time. Assuming the lease of Flat 1 is, so far as material, the same as that for Flat 2, the plaster on the walls is the responsibility of the lessee. If that plaster was not correctly applied by the respondent's contractors, the issue about the cost of that part of the proposed works is a matter for respondent and the lessee of Flat 1 to sort out between them. Such remedial works as may be required should not form part of the service charge.

26. For these reasons we find that if the respondent were to proceed with the proposed works the costs would not be reasonably incurred and the applicant would not be required to contribute to the cost of them.

The Basement Works

27. There is no dispute about the scope or cost of the works that were carried out. The applicant simply queried whether she should have been informed about the intention to carry out the works prior to her completing her purchase of the lease in May 2015

28. Taken in short, in November 2014 there was a water ingress into the cellar. That was investigated. Dye was put into the drains to exclude the possibility of leaks. The conclusion was that it was a one-off event, possibly due to a rise in the water table. The advice given to and accepted by the respondent was that no remedial works were required.

29. If during the run up to the applicant's completion of her lease, her solicitors had made enquiry of the respondent's solicitors whether there were any works or projects in place concerning the basement, Mr Parkinson said the answer would have been 'No'. The applicant did not challenge that evidence and we accept it.

30. Later, during 2015 the water table rise re-occurred, but it came and went. Eventually remedial works were consulted upon and carried out to enable the lessees to continue to have communal use of the cellar.

31. In these circumstances, we find the applicant is liable to pay the £431.64 demanded by an invoice dated 19 November 2015 [226].

The section 20C application

32. The applicant made the application and submitted that the respondent had persisted with an intention to carry out the Flat 1 works and that she was obliged to contribute to the costs such that she had no alternative to make her section 27A application. She said that if the lease enabled the respondent to pass its costs through the service charge, win or lose, that would be unfair to her.

33. Mr Parkinson made a valiant effort to try and persuade us that the lease did entitle the respondent to pass the costs through the service charge. He relied upon paragraph 1(1)(a) of the Fifth Schedule and the expression: *"the cost of employing Managing Agents"*. Mr Parkinson said that his office had dealt with the application throughout and expensive solicitors had not been engaged.

34. We were not convinced by Mr Parkinson's submission but to determine this application we do not have to construe the lease. We ask ourselves the question: Assuming the lease gives the respondent a contractual right to pass the costs of these proceedings through the service charge, would it be just and equitable to deprive the respondent of that right? Our answer is firmly 'Yes'. We come to this conclusion because we

prefer the submissions of the applicant. We find that respondent was making unwarranted threats and claims to contributions to the Flat 1 works, the applicant was forced to come to the tribunal and her case has been upheld.

Reimbursement of fees

35. In connection with these proceedings the applicant incurred fees of £300 and she sought reimbursement.

36. The rival arguments put forward by both parties were broadly the same as regards the section 20C application.

37. There were two limbs to the applicant's case. She won on one, by far the bigger issue, but failed on the other.

38. Taking a broad approach, we find it just and equitable in all of the circumstances that the fees are shared equally between the parties. We have therefore required the respondent to reimburse the applicant 50% of the fees paid. It seems to us that, in the circumstances on the ongoing relationship between the parties that reimbursement can be conveniently made by way of a credit to the cash account.

Judge John Hewitt
12 December 2016

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.